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No. 84-1705

In The

Supreme Court of the United States

October Term, 1984

PRESTRESS ENGINEERING CORPORATION,

Petitioner,

v.

JOSE ISABEL GONZALEZ and JOHN REPYAK,

Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

RESPONDENTS' BRIEF IN OPPOSITION

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May 30, 1985

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QUESTION PRESENTED FOR REVIEW

1. The issue is whether an employee covered by a collective bargaining agreement can maintain a private action for damages caused by a wrongful discharge when the act of discharge violates a stated public policy of the State of Illinois, or is such an employee absolutely restricted to contract remedies by and through the grievance and arbitration procedure of the collective bargaining contract.

STATEMENT OF THE CASE

The case involves the right of an individual to prosecute an action for retaliatory discharge against a former employer. The plaintiff claims the discharge was motivated by the employer's attempt at retribution against the individual because the employee filed an application for benefits under the Illinois Workers' Compensation Act. Any attempt at such retribution is strictly forbidden by the Workers' Compensation Act, but such act of discharge is sanctioned only by a statement in the Act that an employer doing such acts shall be deemed to be acting "unlawfully".

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RULE 28.1 STATEMENT

Plaintiffs Jose Isabel Gonzalez, and John Repyak and Elsie Repyak are individuals and have no connection with any corporation, subsidiaries, or affiliates. Plaintiffs are former members of Local Laborer's Union 996, North Central Illinois Labor's Council, with affiliated pension plan being the Laborers' International Union of North America National (Industrial) Pension Fund, Washington, D.C. Plaintiffs have an unvested interest in the pension plan in the form of "pension credits", a unique non-marketable interest in the pension plan assets.

OPINIONS BELOW

Respondents herein adopt the reprint of the opinions contained in the Petition for Writ of Certiorari.

JURISDICTION

Jurisdiction of the Court invoked under 28 U.S.C. 1257(3) appears to be improper inasmuch as Respondent views this case as one not involving a Federal Statute; only a State of Illinois statute is involved, indirectly, which statute does not interfere or conflict with any Federal Statute in any way.

STATUTES INVOLVED

No statutes of the United States are involved and only a particular statute of the Illinois Workers' Compensation Act is involved,section 138.4(h), Chapter 48, Illinois

Revised Statutes, which is reproduced in the Appendix, p. A-18.

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On Petition for a Writ of Certiorari to the

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondents, Jose I. Gonzalez, and John and Elsie Repayk, by their attorney, Emmanuel F. Guyon, respectfully request that this Court deny the petition for Writ of Certiorari directed to the Supreme Court of Illinois in this case. That opinion is report-

ed as "Midgett v Sackett-Chicago, Inc.", and "Gonzalez, et. al. v Prestress Engineering Corp.," Nos. 59341, 59350, 15 Ill Dec 475, 413 NE 2d 1280, 105 Ill 2d 143.

STATEMENT OF FACTS

The Statement of Facts recited in the Illinois Supreme Court opinion is correct. The only additional statement of importance is that Plaintiff John Repyak was awarded benefits in July, 1981, as noted in the case. Respondent-Defendant Prestress Engineering Corporation appealed the decision to the Full Industrial Commission, which affirmed the decision of the Arbitrator, and further increased the award of benefits to John Repyak. The decision issued on September 16, 1982; the award was paid on November 1, 1982; Plaintiff was discharged in the intervening time, in October, 1982, which act is contended to be

directly and causally related to receipt of the worker's compensation benefit award.

REASONS WHY THE WRIT SHOULD BE DENIED

1. FEDERAL LABOR LAW IS AN ISSUE WHEN A CONTROVERSY EXISTS BETWEEN MANAGEMENT (EMPLOYER) AND THE UNION (ALL EMPLOYEES); THERE IS NO QUESTION OF FEDERAL LABOR LAW WHERE AN INDIVIDUAL EMPLOYEE ASSERTS A PRIVATE CAUSE OF ACTION AGAINST AN EMPLOYER.

An employee is a beneficiary of a union-management contract governing the rights of employees in the on-going relationship with management in an industrial setting. A collective bargaining agreement ".....is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate." United Steelworkers of America v Warrior Gulf and Navigation Co., 363 U.S. 574, 4 L Ed 2d 1409, 80 S. Ct. 1347 (1960). There is a developing Federal common law grounded in national labor policy. This

law contemplates the respective positions of management on one hand, and the union on the other. The Union acts as the employee's exclusive representative in the grievance procedure, as it does in all matters involving the terms and conditions of employment. The Union has the exclusive right and power to speak for a group of employees, and correspondingly assumes a duty to discharge that duty faithfully. Bowen v U.S. Postal Service, ___ U.S. ___, 74 L Ed 2d 402, 103 S. Ct. ___. In the instant case, the plaintiff is not the union; the union is not even in the proceedings. Here the plaintiffs are single individuals, each with a cause of action accruing in their favor based on an act alleged to be violative of the public policy of the State of Illinois. The act of termination in retaliation for the filing of worker's compensation claims affects only that individual, not the entire group of

employees represented by the union. After termination, each of the individuals here are not even members of the union, and the union has no further responsibility for the welfare of the employees. The case before this court does not represent any facet of Federal common-law of labor policy; rather, this case represents the effort of a single individual asserting a private cause of action against a wrongdoer, the latter being the Employer. The developing common law of Federal labor policy is not touched by any facet of this case.

2. AN ACTION FOR CLAIMED WRONGFUL DISCHARGE, VIOLATIVE OF THE PUBLIC POLICY OF THE STATE OF ILLINOIS, IS A PRIVATE CAUSE OF ACTION THAT BELONGS TO THE INDIVIDUAL, AND SUCH ACTION IS ALLOWED TO BE BASED ON A TORT THEORY OR A CONTRACT THEORY OF RECOVERY.

The Supreme Court of Illinois ruled the victim of retaliatory discharge must be given an action in tort, independent of any contract

remedy the employee may have based on the collective bargaining agreement. In order to give an employee a complete remedy against a wrongdoing employer, the sanction of punitive damages must be allowed to protect the important public policy of the State of Illinois--the right to file a claim for benefits under the Worker's Compensation Act without fear of retribution for such filing, including inter alia, the loss of employment. The sanction contained in the statute, section 26, chapter 48 (paragraph 138.26), Illinois Revised Statutes 1981, provides only that a violation of the Act is held to be a petty offense, certainly not enough of a penalty to deter wrongdoers. The remedy afforded by a common law action, which allows punitive damages as well as compensatory damages, is awarded to the victim, not the union or the group of employees represented by the collective bargaining

agreement. Because the victim is awarded damages, it can only be categorized as a private cause of action, not affecting the Federal common law of labor policy. No national interest is affected by a ruling in this case, whether the ruling be for the plaintiff or for the defendant.

3. UNION EMPLOYEES, AND NON-UNION EMPLOYEES ARE ACCORDED FEDERAL STATUTORY RIGHTS THAT CAN BE VINDICATED THROUGH PRIVATE CAUSES OF ACTION.

The opinion of the Supreme Court of Illinois referred to the Defendant's argument of Federal labor policy favoring arbitration, but rejected it squarely, noting that the U.S. Supreme Court has allowed employees covered under collective-bargaining agreements with an arbitration provision to bring claims against employers founded on violations of Federal Statutory rights. Examples of such actions are civil rights violations (McDonald v City

of West Branch (1984) ___ U.S. ___, 104 S. Ct. 1799, 80 L Ed 2d 302), racial discrimination (Alexander v Gardner-Denver Co. (1974), 415 U.S. 36, 94 S. Ct. 1011, 39 L Ed 2d 147), and violation of the Fair Labor Standards Act (Barrentine v Arkansas-Best Freight Systems, Inc., (1981), 450 U.S. 728, 101 S. Ct. 1437, 67 L Ed 2d 641). In each case the successful plaintiff prosecuted a private right of action outside the constraints of the collective-bargaining remedies before bringing the individual cause of action by and through the Federal Statutes referred above. A claim for retaliatory discharge is unique to the individual, and is a private cause of action best resolved by a court proceeding involving only that individual, and the wrongdoer Employer.

4. A TORT THEORY OF RECOVERY ALLOWS A FULL RANGE OF DAMAGES TO AN INJURED PARTY, WHERE A CONTRACT THEORY OF RECOVERY PROVIDES ONLY LIMITED DAMAGES.

The Supreme Court of Illinois held in its opinion that punitive damages could be recovered in a retaliatory discharge action. Punitive damages are recoverable, in addition to the base compensatory damages, because the court wanted to provide a complete remedy to a victim of retaliatory discharge. If a union employee initiates the arbitral proce s, with the arbitrator finding for the victim, the remedy will likely be only job reinstatement and back pay (See Silzer, "Workers' Compensation: Retaliatory Discharge of Employees Covered by a Collective Bargaining Agreement" (1981) 70 Ill, Bar Journal 164). Additionally, the deterrent effect manifests itself only if punitive damages are available to the victim, which principle was implicitly recognized in

the ruling by the express holding of the court. Without the punitive damages option no meaningful sanction can be imposed against a wrongdoer. The type of recovery authorized by the Court is more suitably categorized as a private recovery, belonging to an individual, rather than a group of employees such as a Union.

CONCLUSION

The Petitioners have not demonstrated that review of the decision of the Supreme Court of Illinois is warranted; for these reasons the petition for a writ of certiorari should be denied.

Respectfully Submitted,

JOSE ISABEL GONZALEZ and
JOHN REPAYK & ELSIE REPYAK,
Plaintiffs-Respondents

by: Emanuel F. Guyon
Emmanuel F. Guyon,
Their Attorney

APPENDIX

Statutes to be Construed

Illinois Revised Statutes, chapter 48, section:

138.4(h)

> "(h) It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him by this Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his exercise of the rights or remedies granted to him by this Act.
>
> It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse or rehire or recall to active service in a suitable capacity an employee because of the exercise of his rights or remedies granted to him by this Act."

138.26

> "Any wilful neglect, refusal, or failure to do the things required to be done by any section, clause or provision of this Act, on the part of the person herein required to do them, or any violation of the provisions....., is a petty offense."

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PROOF OF SERVICE

I, EMMANUEL F. GUYON, being a member of the Bar of this Court do hereby certify that on May 30, 1985, pursuant to United States Supreme Court Rule 19.3, I served notice of the date of filing and of the docket number of this cause on a form supplied by the Clerk of this Court, by depositing said notice in a United States mailbox at Streator, Illinois,

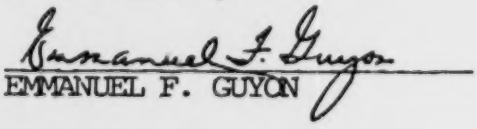
with first-class postage prepaid and addressed to the following counsel who represent all parties required to be served:

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